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No. 02-1524

In The Supreme Court of the United States

SHELLEY WEINSTOCK,

Petitioner,

v.

COLUMBIA UNIVERSITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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FURTHER REASONS FOR GRANTING THE PETITION

Petitioner Shelley Weinstock ("Weinstock") submits this reply to the brief in opposition to *certiorari* submitted by Respondent Columbia University ("Respondent" or "Columbia"). This reply suggests an alternative disposition: *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S. Ct. 2148 (2003), provides grounds for the Court to grant *certiorari*, vacate the judgment below, and remand this matter to the Second Circuit for reconsideration in light of that intervening authority.

I. *COSTA* WARRANTS A SUMMARY ORDER THAT THIS CASE BE RECONSIDERED.

In *Costa*, this Court unanimously held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, does not require plaintiffs to bring forward "direct evidence" in order to prevail. The Court focused on the text of Section 2000e-2(m), which "[o]n its face . . . does not mention, much less require, that a plaintiff make a heightened showing [of discrimination] through direct evidence." *Id.* at 2153. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Id.* at 2154.

Before this Court's decision in *Costa*, the circuits were in disarray as to whether to withhold the burden-shifting presumption this Court developed in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), from all plaintiffs except those who could introduce overtly biased statements so closely connected to the adverse action as to support the almost inexorable conclusion that it was motivated by that very bias. The Second Circuit held that decision-makers'

descriptions of Weinstock as "nice," nurturing,[1] not aggressive, not tough, and a "pushover" could not be relevant because Columbia did not admit that those stereotypes were the reason it failed to promote her. (App. 18) The lower courts had developed that nexus requirement to distinguish between "direct evidence," sufficient to shift the burden to defendants, and "stray remarks," too disconnected from the adverse action to be probative. The Fifth Circuit has recognized that *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), throws the whole "stray remarks" jurisprudence into question. *See Evans v. City of Bishop*, 238 F.3d 586, 591 (5th Cir. 2000) (per curiam); *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 229 (5th Cir. 2000). However, some circuits have resisted this necessary implication of *Reeves*.

Costa drives home *Reeves'* point that biased remarks are relevant even when they are not a direct part of the challenged action. For example, the Fourth Circuit recently reversed and remanded a grant of judgment as a matter of law that predated *Costa* on the ground that, in light of *Costa*, the district court had erred by requiring that statements reflecting discriminatory animus bear directly on the contested employment decision. *See Rowland v. American Gen. Fin., Inc.*, ___ F.3d ___, No. 01-2481, 2003 WL 21912173, at *3-5 (4th Cir. Aug. 12, 2003). Similarly, the petition should be granted, the Second Circuit judgment vacated, and the matter remanded for further proceedings consistent with *Costa*.

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[1] Columbia argues that there is no admissible evidence that the word "nurturing" was used. (Opp. 15) However, Alan Tall ("Tall"), an Ad Hoc Committee ("Ad Hoc") member, admitted that "that concept was discussed," and Samuel Silverstein ("Silverstein"), another Ad Hoc member, did not deny it, and testified that "nurturing" was a "good adjective" to describe Weinstock's "mentoring" abilities. Weinstock was told that the word "nurturing" was used at the Ad Hoc as a way of devaluing her work.

The record here is infected with biased remarks by the two Ad Hoc members who voted against tenure for Weinstock; by then-Provost Jonathan Cole ("Cole"), the ultimate decision-maker; and by others on whom Cole admitted he relied. Tall and Silverstein referred to Weinstock, whom they had never met, as "Shelley"; Paul Hertz ("Hertz"), another Ad Hoc member, testified that he believed that they referred to her by her first name and without her proper title because she was a woman. Moreover, it is uncontested that Tall and Silverstein referred to Weinstock as "nice" and in terms equivalent to nurturing; and that neither of those qualities, by those or any other name, are relevant to the tenure decision. Hertz and Professor Lila Braine ("Braine"), another Ad Hoc member, testified that those comments reflected gender bias, and a court applying the analysis mandated by *Costa* and *Price Waterhouse* could consider those statements (even if they are indirect evidence) as reflecting undue weight given to Weinstock's gender rather than her academic credentials.

After the Ad Hoc's deliberations, Cole sought out additional input from Professor Richard Breslow ("Breslow"). Breslow had previously supported Weinstock's candidacy and had submitted a letter in praise of her research; yet in this conversation, he spoke of her in terms that even Respondent cannot deny were tainted by gender stereotyping (Opp. 15 n.7), describing her as "not tough," a "pushover," and "a perfectly nice person."[2] As Judge Cardamone wrote in dissent:

> The inappropriate focus on Weinstock's 'feminine' qualities in the tenure process led Cole and perhaps others to discount her 'masculine' success as a researcher and professor. While Hopkins was punished for failing to perform a 'feminine' role, Weinstock was punished for performing it too well.

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[2] *See Price Waterhouse*, 490 U.S. at 257 (noting that it was some of Hopkins' supporters who invoked gender stereotypes during her partnership deliberations).

> The problem both Weinstock and Hopkins faced was that their employers demanded that they perform both 'masculine' and 'feminine' roles, yet perceived those roles as fundamentally incompatible. Hopkins was punished because her 'masculinity' appeared inconsistent with gendered stereotypes of how women should look and behave; Weinstock was punished because her 'femininity' appeared inconsistent with 'masculine' success as a researcher.

(App. 47) Reversal and remand is appropriate so that the Second Circuit may determine whether these stereotypes, now open for consideration under *Costa*, unlawfully influenced Columbia's decision.

II. THE OPPOSITION BRIEF MISREPRESENTS THE GROUNDS ON WHICH WEINSTOCK SEEKS *CERTIORARI*.

Columbia advances the following arguments in opposition to *certiorari*: the underlying case has its own set of facts; the circuit splits alleged do not exist; the record does not contain sufficient evidence to support this Court's consideration of the legal issues presented in the petition; and Weinstock is seeking a per se rule to govern dispositive motions in Title VII cases. None of these arguments is correct.

First, respondent argues that *certiorari* should not be granted because *Weinstock* arises out of its own particular facts. (Opp. 7) But this is always the case where the petitioner seeks review of questions relating to the relevance of evidence and burden-shifting. By Columbia's logic, this Court should not have concerned itself with *Costa*, *Reeves*, *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), *Price Waterhouse, United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), or *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972). Nor is Weinstock asking this Court to determine the sufficiency of her evidence. Rather, Weinstock seeks review on the purely legal question of whether the types of

evidence she proffered are relevant to the question of pretext and therefore *may* require denial of summary judgment for employers in Title VII cases. While Weinstock believes that if her evidence on pretext were considered it would suffice to defeat summary judgment, the question on *certiorari* is whether those categories of evidence may be taken into consideration at all, not the weight to be accorded them. *Certiorari* is warranted here because the Second Circuit categorically rejected the relevance of her proofs on pretext – proofs that are commonly accepted in other federal courts.

Second, *certiorari* is warranted because the circuit splits Weinstock highlights (Pet. 11-29) represent deep and mature divisions among the circuits created because some courts consistently refuse to credit certain types of evidence, with the end result that plaintiffs are never permitted to prove pretext by those avenues. Such an unvarying practice amounts to a per se rule discounting those types of evidence, insulating academic institutions in certain jurisdictions from liability for discrimination. The Second Circuit's contention that academic institutions should somehow be shielded from rigorous application of anti-discrimination laws in the name of academic freedom (App. 13-15) runs headlong into Congress' contrary judgment. More than three decades ago, Congress repealed the exemption in Title VII for educational institutions. Equal Opportunity Act of Mar. 24, 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-1). Nonetheless, the Second, Fifth, Seventh, Tenth, Eleventh, and District of Columbia Circuits have *never* rejected an academic institution's defense that tenure was denied due to allegedly insufficient scholarship, and hence have *never* (in a published opinion) denied summary judgment or judgment as a matter of law to a university defending a tenure decision under Title VII.[3] The universal success of that

[3] *See, e.g., Lim v. Trustees of Ind. Univ.*, 297 F.3d 575, 581 (7th Cir. 2002); *Krystek v. University of S. Miss.*, 164 F.3d 251, 257 (5th Cir. 1999); *Dasgupta v. University of Wis. Bd. of Regents*, 121 F.3d 1138,

(Continued on following page)

defense in *half* the circuits suggests that this Court's promise of "a fair opportunity to show that [the college's or university's] stated reason for [a professor's] rejection was in fact pretext," *McDonnell Douglas*, 411 U.S. at 804, is a dead letter to tenure candidates in half of our nation.

Other types of evidence are also routinely disregarded in some circuits. (Pet. 11-17, 20-24) For example, the decision below recites that procedural irregularities may be evidence of pretext if they support the inference that a biased decision-maker distorted the process to orchestrate a pre-ordained conclusion. (App. 28) However, it refused to apply that rule here, although Cole had subverted the process as follows:

- Cole began the process by appointing to the Ad Hoc two medical school professors lacking the familiarity with Barnard College required by the written Affiliation Agreement between Barnard and Columbia.
- Cole imposed a new standard devised especially for Weinstock, the first woman in the hard sciences to come up for tenure when he was Provost.
- Cole expressed his negative opinion of Weinstock at the Ad Hoc meeting in direct contravention of the written rules governing it, which required him to remain both neutral and silent.
- Cole called non-Ad Hoc members to solicit views contrary to the Ad Hoc's vote.
- Cole overturned the positive Ad Hoc vote.
- Cole delayed in submitting his required written explanation for deviating from the Ad Hoc's vote.

1141 (7th Cir. 1997); *Wu v. Thomas*, 847 F.2d 1480, 1484 (11th Cir. 1988); *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984); *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980).

- Cole misstated the outcome of the vote when he finally complied with the requirement to explain his decision.

(*Id.* 39-42, 44). Those facts could reasonably support a finding of pretext, yet the Second Circuit concluded that they could not have affected the ultimate outcome. That conclusion defies common sense and the record. Here, a single procedural irregularity – holding Weinstock, a Barnard candidate, to the Columbia research standard – dictated the outcome, as both respondent and the decision below concede. (Opp. 5; App. 13) Yet the record reveals sufficient proof for a jury to believe that Weinstock was alone among Barnard candidates in being measured against this heightened standard:

- The Vice Provost admitted that Cole had granted tenure to Barnard candidates who would not have received tenure at Columbia, and wrote a memorandum to Cole reminding him of his previous statements that "Various Barnard candidates would never be considered for tenure in the Columbia department" and that "*a less rigorous standard that requires less in the way of scholarship does appear to have emerged*" and, finally, that "*some candidates were not up to Columbia's standards but were fine for Barnard*" (emphasis added);
- The Dean of Barnard testified that it is not a requirement for tenure at Barnard that a candidate be qualified for tenure at Columbia, or any other research university; and
- Breslow stated that he learned of Columbia's purportedly uniform standard for Columbia and Barnard candidates in the context of the denial of tenure to Weinstock, and further doubted "whether that is an attainable standard."

Cole reverted to the previous, lower standard at the first opportunity in granting tenure to Timothy Halpin-Healy ("Halpin-Healy"), a Barnard physics professor. Two Ad Hoc members expressed the view that they were applying

Barnard, not Columbia, standards to Halpin-Healy. Cole himself sat silent when an Ad Hoc member stated that Halpin-Healy's research, while sufficient for Barnard, would not pass muster at Columbia, in marked contrast to his insistence that Weinstock's Ad Hoc measure her against the Columbia standard. For those reasons, the Second Circuit's statement that Weinstock's "only evidence" of the differential standards was that one member of Halpin-Healy's Ad Hoc "may have expressed the opinion that his research was not up to Columbia University standards" (App. 21) is wrong, and its decision that the procedural irregularities could not have affected the outcome is in error (App. 19).

Although the majority gave lip service to the principle that "[d]epartures from procedural regularity . . . *can* raise a question as to the good faith of the process where the departure may reasonably affect the decision" (App. 18), it allowed the exception to swallow the rule, rendering the rule a virtual dead letter in academic cases.[4] The circuit splits Weinstock seeks to have resolved represent different rules of law not "in the air" but "brought to ground and visited upon an employee." *Price Waterhouse*, 490 U.S. at 251 (quotation marks omitted).

Third, Respondent protests that this case is not the proper vehicle for resolving the circuit splits Weinstock identifies because of alleged deficiencies in her factual proof. (Opp. 5, 7-8, 12-13, 15, 17) Respondent misrepresents the record. Respondent suggests that the procedural irregularities at issue here "[took] place at a far remove from the actual decisionmaker," and that therefore Weinstock is

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[4] *See Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 453-54 (2d Cir. 1999); *Zahorik*, 729 F.2d at 93; *accord Kobrin v. University of Minn.*, 121 F.3d 408, 415 (8th Cir. 1997); *Brousard-Norcross v. Augustana Coll. Ass'n*, 935 F.2d 974, 977 (8th Cir. 1991); *Banerjee v. Board of Trs. of Smith Coll.*, 648 F.2d 61, 66 (1st Cir. 1981); *but see Stern v. Columbia Univ.*, 131 F.3d 305, 313 (2d Cir. 1997) (reverse discrimination, non-tenure case).

seeking a rule that procedural irregularities "always and necessarily" and "invariably" provide evidence of pretext (Opp. 9-10), notwithstanding that the record reflects that the procedural irregularities were orchestrated by the decision-maker, Cole, and no one else. (*See supra* at 7) Accordingly, Respondent's attempt to distinguish the cases demonstrating a conflict in the circuits based on an alleged "disconnect between the decisionmaker (and his decision) and asserted procedural irregularities" (Opp. 10-12) is unavailing.

Moreover, Respondent's attempt to downplay the predominantly male composition of its workforce by trivializing it as statistics "'culled from an *amicus* brief and never presented to the district court'" (Opp. 17) must fail. Weinstock showed the "inexorable zero" – that is, the fact that when she was denied tenure there were no women in Columbia's Chemistry Department – in her submissions to the district court and the Second Circuit, which in turn prompted Respondent to boast, curiously, in its own appellate brief of having conferred tenure on a grand total of two female Chemistry professors over the course of more than forty years.

Fourth and finally, what Weinstock seeks is not a per se rule. On the contrary, what plaintiff seeks review of is an evidentiary standard in Title VII cases that renders it virtually impossible to show discrimination in an academic setting. The Second Circuit has acknowledged a division among circuits as to whether, upon proving pretext, plaintiffs survive summary judgment in the absence of conclusive evidence rebutting unlawful discrimination. *See Zimmerman v. Associates First Capital Corp.*, 251 F.3d 376, 381-82 (2d Cir. 2001). It is only fair that discrimination victims across the country and multi-state employers operate under a uniform burden-shifting paradigm.

CONCLUSION

For the foregoing reasons, and for those in the petition, the petition for writ of *certiorari* should be granted,

the judgment of the Second Circuit vacated, and the case remanded for further consideration in light of this Court's decision in *Costa*. In the alternative, the petition should be granted and the case set down for plenary briefing and argument.

Dated: New York, New York
September 11, 2003

Respectfully submitted,

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